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No. 04-___

In The
Supreme Court of the United States

WILLIAM B. CALDWELL, III, and
BEN FRANK BILLINGS, III, for Themselves and as Representatives of a Class of Similarly Situated Persons,

Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Should a Trails Act taking (as discussed in this Court's *Preseault v. ICC* decision) be analyzed as a *per se* physical taking of an easement in land, or as a regulatory taking of that easement?

II. If a government agency authorizes a third party to take possession of a citizen's land upon the third party's satisfaction of certain conditions, does a taking occur (a) upon the issuance of the regulatory authorization or (b) when (and if) the third party satisfies the conditions and takes possession?

PARTIES TO THE PROCEEDINGS BELOW

The caption identifies the parties to the proceedings below.

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PETITION FOR WRIT OF CERTIORARI

William B. Caldwell, III, and Ben Frank Billings, III, for themselves and as representatives of a class of similarly situated persons, respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The December 14, 2004 opinion of the U.S. Court of Appeals for the Federal Circuit (Pet. App. 1) is published at 391 F.3d 1226. The June 30, 2003 opinion of the U.S. Court of Federal Claims (Pet. App. 25) is published at 57 Fed. Cl. 193.

JURISDICTION

This Court has jurisdiction over the Petition for Certiorari pursuant to 28 U.S.C. § 1254(1) and Rules 13.1 and 13.3 of this Court. This is a petition for writ of certiorari to review a decision of the U.S. Court of Appeals, Federal Circuit dated December 14, 2004. On January 28, 2005, the Petitioners filed a timely petition for rehearing en banc in the Court of Appeals for the Federal Circuit, which was denied by that court on March 23, 2005.

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The relevant constitutional, statutory, and regulatory provisions are reproduced in the Appendix at 57-71.

STATEMENT OF THE CASE

Petitioners own land burdened by a Georgia railroad right-of-way. They brought suit under the Tucker Act on behalf of themselves and a putative class of nearly 400 landowners to recover compensation for the taking of private property worked by the National Trails System Act

("Trails Act") and first discussed in *Preseault v. ICC*, 494 U.S. 1 (1990). Over a vigorous and cogent dissent, the Federal Circuit deemed their claims untimely. Petitioners ask the Court to address when and how the Trails Act taking occurs – and in doing so, to correct an erroneous decision of the Federal Circuit that not only prematurely bars claims in Trails Act taking cases brought across the country,[1] but infects determinations of ripeness, standing and compensation in every such case or similar case.

Ben Frank Billings, III and William Caldwell, III ("the Petitioners") are fee simple owners of land in Columbus, Georgia that was burdened by a railroad easement owned by Norfolk Southern Railroad Company ("Norfolk Southern" or "the Railroad"). On October 9, 1996, pursuant to the Trails Act, Norfolk Southern purported to convey its interest in a portion of the railroad right-of-way known as the "Warm Springs Line" by deed to the City of Columbus ("the City"), which planned to operate it as a public trail.

On October 7, 2002, Billings and Caldwell filed suit in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491 (Pet. App. 58), on behalf of themselves and a putative class of similarly situated landowners, alleging the conversion to trail use had effected a Fifth Amendment taking. However, the Court of Federal Claims dismissed the complaint on the ground that the Petitioners had not filed it within the six-year statute of limitations provided in 28 U.S.C. § 2501. The Court of Federal Claims, approaching the case as a regulatory taking, found that the Petitioners' claims accrued not when the Petitioners' reversionary[2] interests were taken through the Railroad's

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[1] As discussed in further detail *infra* at 18, the U.S. Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals in all federal suits founded on the Constitution, including the taking claims alleged in this case.

[2] "Reversion," used strictly as a term of art, only refers to a future interest in land that remains after an estate in land (*e.g.*, a life estate)

(Continued on following page)

conveyance of its property to the City (as trail operator), but when the Railroad and the City entered into a purchase and sale agreement for the Warm Springs Line. (Pet. App. 25-50).

The Petitioners appealed, and the Federal Circuit affirmed, but rejected the Court of Federal Claims' analysis of the accrual date. A majority of the panel instead found that the Petitioners' claims accrued even earlier – when the Surface Transportation Board ("STB")[3] first issued a notice pursuant to the Trails Act beginning a negotiating period between the Railroad and the City – because that was the date of the last "government action" leading to trail use. (Pet. App. 1-18). Judge Newman dissented, agreeing with the Petitioners that their claims could not have accrued before the City took possession of the land for trail use. (Pet. App. 18-24). The court rejected *en banc* rehearing. (Pet. App. 54).

Petitioners ask this Court to review and correct the Federal Circuit's determination of when a Trails Act taking occurs, a determination that affects timeliness, standing and compensation in every Trails Act taking case brought against the United States. Not only is the Federal Circuit's opinion binding precedent for all Trails Act cases, it has implications for determining the timeliness of any

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has been taken. *Black's Law Dictionary* 1345 (8th ed. 2004). However, it is used in this Petition only as shorthand for describing the result of the easement being abandoned for railroad purposes – the previously burdened land "reverts" to the full, unburdened possession of the landowner. Thus, as used here, it is a present interest in land. *See Preseault v. United States [Preseault II]*, 100 F.3d 1525, 1533 (Fed. Cir. 1996) (*en banc*).

[3] The STB (previously the Interstate Commerce Commission, or "ICC") is an executive agency with plenary authority to regulate the operation of railroads; its approval is required in order for a railroad to abandon its rail lines. *NARPO v. STB*, 158 F.3d 135, 137 (D.C. Cir. 1998). Although the proceedings in this case began before the STB succeeded the ICC, to avoid confusion, the Petition will refer only to the STB.

taking claim that arises when government regulation precedes a physical taking.

A. Statutory Framework

In an effort to preserve rail corridors, Congress passed the Trails Act, 16 U.S.C. § 1241 *et seq.*, which requires that, before a railroad can consummate a government-approved abandonment of its rail line, interested and qualified agencies must have the opportunity to negotiate with the railroad to acquire possession of the rail segment and operate it as a public recreational trail, on the condition that the corridor might be returned to railroad use at some point in the future. 16 U.S.C. § 1247(d) (Pet. App. 60); *see Preseault v. ICC [Preseault I]*, 494 U.S. 1, 5-6 (1990). This process is called "railbanking," because, in theory, it places the rail line in a national "rail bank" to be "withdrawn" for use when it becomes appropriate and economically feasible.

The difficulty with this approach is that, under the law of many states, when an easement granted for a limited purpose is no longer used for that purpose, the easement is deemed abandoned, *Preseault I*, 494 U.S. at 8-9, 16, and the owner of the underlying land is once again entitled to use it as he pleases – which defeats the conversion to trail use. Thus, the Trails Act provides that, in the event the rail line is converted to trail use, "such interim [trail] use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d) (Pet. App. 60). This interference with normal state property law principles, which would otherwise require the property to revert to the landowner upon the railroad's abandonment, is what gives rise to the taking alleged in this case. *Preseault I*, 494 U.S. at 8-9.

A railroad may opt to begin the STB process for abandoning a portion of its railroad line by requesting either an application for abandonment or an exemption